COPY

Supreme Court, U.S.
FILED
011862 JUN 13 2002
OFFICE OF THE CLERK

No. 01A855

IN THE SUPREME COURT OF THE UNITED STATES

JEANNE WOODFORD, Warden, *Petitioner,*

v.

ROBERT FREDERICK GARCEAU, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

BILL LOCKYER
Attorney General of the State of California
ROBERT R. ANDERSON
Chief Assistant Attorney General
JO GRAVES
Senior Assistant Attorney General
CLAYTON S. TANKA
Deputy Attorney General
JANIS SHANK McLEAN
Supervising Deputy Attorney General
Counsel of Record
1300 I Street
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-8610
Fax: (916) 324-2960
Counsel for Petitioner

30pp

CAPITAL CASE
QUESTIONS PRESENTED

1. In *Lindh v. Murphy*, 521 U.S. 320 (1997), this Court held that the Antiterrorism and Effective Death Penalty Act (AEDPA) (28 U.S.C. § 2241, *et seq.*) did not apply to cases which commenced prior to the AEDPA's April 24, 1996, effective date. The circuits are split as to when a capital case commences for purposes of triggering the AEDPA. With one exception, all the circuits to consider the issue have found the AEDPA applies if the actual petition was filed on or after the AEDPA's effective date. However, in the Ninth Circuit, the AEDPA does not apply to a federal petition filed on or after April 24, 1996, if motions for appointment of counsel and stay of execution were filed before that date. *Calderon v. United States District Court (Kelly)*, 163 F.3d 530 (9th Cir. 1998) (en banc). What is the correct trigger event for the application of the AEDPA in capital cases?

2. The Ninth Circuit applied a new rule of constitutional law to reverse the capital conviction in this case. The Ninth Circuit was indisputably on notice, from a source other than the prosecution, of the application of *Teague v. Lane*, 489 U.S. 288 (1989), but did not address it. The failure to address *Teague* conflicts with the Fifth Circuit's holding that, even where *Teague* is not raised, it is an abuse of discretion not to consider it, absent a compelling, competing interest of justice. *Jackson v. Johnson*, 217 F.3d 360, 361-63 (5th Cir. 2000).

A. Did the Ninth Circuit abuse its discretion in failing to consider *Teague v. Lane*, 489 U.S. 288?

B. Since the *Teague* issue is properly raised in the petition for certiorari, and presents a threshold issue for this Court's determination, should the Ninth Circuit's reversal of Garceau's capital conviction, based on the application of a new rule of constitutional law be vacated by this Court?

TABLE OF CONTENTS

	Page
OPINION BELOW	1
STATEMENT OF JURISDICTION	2
THE STATUTE APPLICABLE TO THE FIRST ISSUE PRESENTED	2
STATEMENT OF THE CASE	2
ARGUMENT	5
I. THE APPLICATION OF THE AEDPA TO A CAPITAL CASE IS PROPERLY DETERMINED BY THE DATE THE FEDERAL HABEAS PETITION WAS FILED. THE NINTH CIRCUIT'S CONTRARY INTERPRETATION RAISES A SPLIT IN THE CIRCUITS AND IS WRONG	5
II. THE NINTH CIRCUIT ABUSED ITS DISCRETION IN GRANTING HABEAS RELIEF WITHOUT ADDRESSING *TEAGUE v. LANE*. THIS COURT SHOULD RESOLVE A SPLIT IN THE CIRCUITS, ADDRESS THE APPLICATION OF *TEAGUE*, AND VACATE THE DECISION	10
A. The Ninth Circuit Abused Its Discretion In Failing To Address *Teague*	12

TABLE OF CONTENTS (continued)

	Page
B. The Ninth Circuit's Reversal Of *Garceau's* Capital Conviction Is Improperly Based On A New Rule Of Constitutional Law And The Decision Should Be Vacated By This Court	15
CONCLUSION	17

TABLE OF AUTHORITIES

Cases	Page
Butler v. McKellar 494 U.S. 407 (1990)	12
Calderon v. United States District Court (Kelly) 163 F.3d 530 (9th Cir. 1998)	5-9, 16
Calderon v. United States District Court for the Central District of California (Beeler) 128 F.3d 1283 (9th Cir. 1997)	5, 8
Caspari v. Bohlen 510 U.S. 383 (1994)	13
Chapman v. California 386 U.S. 18, 87 S.Ct. 824 (1967)	10, 16
Collins v. Youngblood 497 U.S. 37 (1990)	13
Ex Parte Quirin 317 U.S. 1 (1942)	6, 9
Garceau v. Woodford 275 F.3d 769 (9th Cir. 2001)	1, 3, 5, 6, 9, 11-13
Garceau v. Woodford 281 F.3d 919 (9th Cir. 2000)	3, 13

TABLE OF AUTHORITIES (continued)

	Page
Godinez v. Moran 509 U.S. 389 (1993)	15
Gosier v. Welborn 175 F.3d 504 (7th Cir. 1999)	9
Graham v. Collins 506 U.S. 461 (1993)	12
Hohn v. United States 524 U.S. 236 (1998)	6, 7, 9
Jackson v. Johnson 217 F.3d 360 (5th Cir. 2000)	14, 15
Lambrix v. Singletary 520 U.S. 518 (1997)	15
Lindh v. Murphy 521 U.S. 320 (1997)	i, 6
McFarland v. Scott 512 U.S. 849 (1994)	9
Moore v. Gibson 195 F.3d 1152 (10th Cir. 1999)	9
Penry v. Lynaugh 492 U.S. 302 (1989)	13
People v. Robert Garceau 6 Cal.4th 140 (1993)	2, 10, 11, 16

TABLE OF AUTHORITIES (continued)

	Page
Schiro v. Farley 510 U.S. 222 (1994)	15
Stringer v. Black 503 U.S. 222 (1992)	12
Teague v. Lane 489 U.S. 288 (1989)	3, 10, 12-16
Williams v. Cain 125 F.3d 269 (5th Cir. 1997)	9
Williams v. Coyle 167 F.3d 1036 (6th Cir. 1999)	9

Constitutional Provisions

Statutes

21 U.S.C. § 848(q)(4)	6
28 U.S.C. § 1254	6
28 U.S.C. § 1254(1)	2
28 U.S.C. § 2241, *et seq.*	i
28 U.S.C. § 2241-2255	6
28 U.S.C. § 2254	2
28 U.S.C. § 2254(d)	6, 16
28 U.S.C. § 2254(d)(1)	16

TABLE OF AUTHORITIES (continued)

	Page
Chapter 153, 28 U.S.C. § 2241-2255	2
Chapter 154, 110 Stat. 1226, Public Law 104-132, section 107(c)	2, 6

Court Rules

Rules of the Supreme Court of the United States	
Rule 10 (c)	13
Rule 14(d)	1

Other Authorities

Antiterrorism and Effective Death Penalty Act (AEDPA)	2-3, 5-9

IN THE SUPREME COURT OF THE UNITED STATES

No. 01A855

JEANNE WOODFORD, Warden, *Petitioner,*

v.

ROBERT FREDERICK GARCEAU, *Respondent.*

OPINION BELOW[1/]

Petitioner, Jeanne Woodford, Warden, California State Prison, San Quentin, represented by the State of California (the State), respectfully petitions for a writ of certiorari to review the December 26, 2001, order and opinion of the United States Court of Appeals for the Ninth Circuit ("the Ninth Circuit") in *Garceau v. Woodford*, 275 F.3d 769 (9th Cir. 2001) (No. 99-99022) (hereafter "*Garceau*") (Appendix A), which reversed the judgment of the United States District Court for the Eastern District of California dismissing Respondent's application for a writ of habeas corpus.

---

1. This section contains the citations required by Rule 14(d) of the Rules of the Supreme Court of the United States.

STATEMENT OF JURISDICTION

The jurisdiction of the district court was invoked under 28 U.S.C. § 2254. On December 26, 2001, the Ninth Circuit entered its order and opinion in *Garceau v. Woodford,* 275 F.3d 769, and, on February 15, 2002, denied rehearing and rehearing en banc. (Appendices A and B.) This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

THE STATUTE APPLICABLE TO THE FIRST ISSUE PRESENTED

This case involves the application of the Antiterrorism and Effective Death Penalty Act of 1996. Chap. 153, 28 U.S.C. § 2241-2255 (Appendix F), and that provision of Chapter 154, 110 Stat. 1226, Public Law 104-132, section 107(c), which provides:

> (c) EFFECTIVE DATE.--Chapter 154 of title 28, United States Code (as added by subsection (a)) shall apply to cases pending on or after the date of enactment of this Act.

STATEMENT OF THE CASE

In 1987, Robert Garceau was convicted in Kern County Superior Court, California, of two counts of first degree murder. The victims were Garceau's girlfriend, Maureen Bautista and her 14-year-old son, Telesforo Bautista, who were both stabbed to death in September 1984.

Garceau challenged his conviction through a direct appeal to the California Supreme Court. The conviction was affirmed in *People v. Robert Garceau,* 6 Cal.4th 140 (1993), a published opinion issued on November 18, 1993. (Appendix E.) Although the California Supreme Court held that the trial

court erroneously instructed the jury that evidence of Garceau's other bad acts could be considered as it bore on Garceau's character, the court held it was non-prejudicial under any standard of review and did not decide if the instruction constituted a denial of due process.

Garceau filed requests for appointment of federal habeas counsel and stay of his execution on May 12, 1995. On April 24, 1996, the AEDPA went into effect. Garceau then filed his federal petition for habeas corpus on July 2, 1996. *Garceau v. Woodford*, 275 F.3d at 772. Ultimately, the federal district court denied Garceau's habeas petition

The Ninth Circuit Court of Appeals issued a published opinion, dated December 26, 2001, reversing the District Court's order and the underlying state conviction. Applying a newly-announced rule of constitutional law, the Ninth Circuit found an "other crimes" jury instruction to constitute prejudicial constitutional error. However, the panel opinion also noted that this Court "has never expressly held that it violates due process to admit other crimes evidence for the purpose of showing conduct in conformity therewith, or that it violates due process to admit other crimes evidence for other purposes without an instruction limiting the jury's consideration of the evidence to such purposes. Indeed, the Supreme Court has expressly declined to answer these questions." (Appendix A; *Garceau*, 275 F.3d 769.) Judge O'Scannlain's dissent stated that the rule of non-retroactivity in *Teague v. Lane* could have prevented the majority's conclusion. However, Judge O'Scannlain believed that the State had disavowed reliance on *Teague* at oral argument.

The State filed a petition for rehearing and rehearing en banc which was denied on February 15, 2002. The State raised the same claims now raised to this Court in the petition for certiorari. In its denial, the Ninth Circuit acknowledged its discretion to consider a *Teague v. Lane,* 489 U.S. 288 (1989), claim raised for the first time in a petition for rehearing, but declined to exercise that discretion. (Appendix B; *Garceau v.*

Woodford, 281 F.3d 919 (9th Cir. 2000).)

On February 25, 2002, the Ninth Circuit granted the State's motion for stay of mandate so that a petition for certiorari could be filed with this Court. (Appendix C.)

ARGUMENT

I.

THE APPLICATION OF THE AEDPA TO A CAPITAL CASE IS PROPERLY DETERMINED BY THE DATE THE FEDERAL HABEAS PETITION WAS FILED. THE NINTH CIRCUIT'S CONTRARY INTERPRETATION RAISES A SPLIT IN THE CIRCUITS AND IS WRONG

There is a split in the circuits as to the correct trigger event to be used in determining whether the AEDPA applies to a petition for writ of habeas corpus filed in a capital case. With the exception of the Ninth Circuit, the circuits to consider the issue have found the AEDPA applies if the petition was filed on or after the AEDPA's April 24, 1996, effective date. However, the Ninth Circuit has found that the AEDPA does not apply to a federal petition filed on or after April 24, 1996, if motions for appointment of counsel and stay of execution were filed before that date. *Calderon v. United States District Court (Kelly),* 163 F.3d 530 (9th Cir. 1998) (en banc).[2/] This petition for certiorari asks this Court to resolve the disagreement between the circuits as to the correct trigger event for determining the application of the AEDPA in capital cases.

In *Garceau v. Woodford*, 275 F.3d 769, requests for counsel and stay of execution were filed before the enactment

---

2. *Kelly* overruled that portion of *Calderon v. United States District Court for the Central District of California (Beeler)*, 128 F.3d 1283 (9th Cir. 1997), which used the filing of the federal habeas petition as the trigger date for determining whether the AEDPA's statute of limitations applied to a petition.

of the AEDPA, and the federal habeas petition was filed after enactment. The Ninth Circuit applied the rule announced in *Kelly* to find the provisions of the AEDPA – specifically those contained in 28 U.S.C. § 2254(d) – inapplicable to the case. *Garceau*, at 772, fn. 1. This permitted the Ninth Circuit to conduct *de novo*, rather than deferential, review of the California Supreme Court's adjudication of the due process claim raised. Moreover, it permitted the Ninth Circuit to extend and apply its own jurisprudence, rather than "clearly established United States Supreme Court precedent. The *Garceau* majority admitted that existing United States Supreme Court precedent had not found a due process violation under the facts presented in this case. *Garceau*, at 774-775. The failure to apply 28 U.S.C. § 2254(d) resulted in the granting of the habeas petition.

The Ninth Circuit's decision in *Kelly*, 163 F.3d 530, was wrongly decided. *Lindh v. Murphy*, 521 U.S. 320, provides that the AEDPA's provisions contained in chapter 153 (28 U.S.C. § 2241-2255), do not apply to "cases pending" at the time of the statute's enactment.[3] *Kelly*'s majority looked to *Hohn v. United States*, 524 U.S. 236 (1998), to determine the meaning of "cases pending." In *Hohn*, the denial of a certificate of appealability was deemed to constitute a "case" for purposes of Supreme Court jurisdiction under 28 U.S.C. § 1254. *Hohn* in turn relied on *Ex Parte Quirin*, 317 U.S. 1 (1942), which provides that a request for leave to file a petition for a writ of habeas corpus was a "case"over which the court of appeals could assert jurisdiction. Analogizing to *Hohn* and *Ex Parte Quirin*, the *Kelly* majority found an application for appointment of counsel under 21 U.S.C. § 848(q)(4), and a request for stay of execution to constitute a pending "case." Applying this precedent, the *Kelly* court felt compelled to find that:

---

3. Chapter 153 does not contain Chapter 154's language making the latter's provisions applicable to cases pending at the time of the statute's enactment. 110 Stat. 1226, section 107(c).

> Like a request for leave to file a habeas petition, a petition for the appointment of counsel to prepare and file a petition for a writ of habeas corpus, accompanied by a motion for a stay of execution under *McFarland* [512 U.S. 849, 858 (1994)], is a threshold action that presents a "case" to the district court. By analogy to *Hohn*, it follows that a petition for appointment of counsel under *McFarland* creates a pending habeas case. [Fn. omitted.] Accordingly, we overrule those portions . . . [of contrary Ninth Circuit cases] that held that a habeas corpus case is pending only when the habeas petition itself has been filed. A petition for the appointment of counsel to prepare and file a habeas petition, coupled with a motion for a stay of execution, also suffices.

Kelly, 163 F.3d at 540.

Circuit Judge Cynthia Holcomb Hall dissented from the majority's reasoning in *Kelly*. Judge Hall found that the majority employs an "overbroad interpretation" of the Supreme Court's opinion in *Hohn v. United States*, 524 U.S. 236. *Kelly*, 163 F.3d at 544. "At the heart of the majority's error is its unreflective act of equating the word 'case' as used in *Hohn"* with the meaning of the word for purposes of determining whether the provisions of the AEDPA apply. *Id.* "[T]he words may appear the same, but their meanings are vastly different." *Id.*

> In *Hohn*, the Supreme Court was defining "case" for purposes of determining whether a court of appeals decision denying an application for a certificate of appealability under § 28 U.S.C. S 1253(c) constituted a "case" for purposes of Supreme Court jurisdiction under §28 U.S.C. 1254 and the "case or controversy" requirement of Article III. See 524 U.S. at ----, 118 S.Ct. at 1972.

Id. at 545. *Hohn*'s use of "case" is a significantly different context than defining "case" for purposes of determining

whether the AEDPA's statute of limitations applies, as was the situation in *Kelly*, 163 F.3d 530, and in *Beeler*, 128 F.3d 1283 (overruled as to the definition of "case" by *Kelly*).

As Judge Hall explained:

> Even if *Hohn* [524 U.S. 236] and *Beeler* [128 F.3d 1283] were using the word "case" to mean the exact same thing (which they were not), the cases are so factually distinguishable as to belie the argument that one "has vitiated" the other. In *Hohn*, the Supreme Court merely stated that a habeas corpus petition that had been ruled upon in the District Court but denied a certificate of appealability remained a case for purposes of a petition for certiorari. The case before us deals with a request for counsel and a stay of execution where no habeas petition had been filed, and thus there was nothing that could "remain" a case.

Kelly, 163 F.3d at 545.

Lastly, Judge Hall found that:

> The majority overlooks another underlying rationale in *Hohn*: that a certificate of appealability involves adversity. See 524 U.S. at ----, 118 S.Ct. at 1972. By overlooking this rationale, the majority can in conclusory fashion state that a petition for appointment of counsel accompanied by a motion for a stay of execution is a "case," even though indigents have the mandatory right to counsel under 21 U.S.C. § 848(q)(4)(B), see *McFarland v. Scott*, 512 U.S. 849, 854, 114 S.Ct. 2568, 129 L.Ed.2d 666 (1994), and a stay of execution will usually be granted to allow counsel "meaningfully to research and present a defendant's habeas claims." *Id.* at 858, 114 S.Ct. 2568. Because the request for counsel and a stay did not involve true adversary proceedings, I would hold that, even if *Hohn* 's definition of a "case" applied to the proceedings before us (which it does not), no such case had been initiated before the statute of limitations expired.

Id. at 545.[4]

In all, four other federal circuits have rejected the reasoning underlying *Kelly*. The Fifth, Sixth and Seventh and Tenth Circuits have all used the filing of the habeas petition on or after April 24, 1996, as the trigger event for the application of the AEDPA. Using similar reasoning to that employed in Judge Hall's dissent, these cases reject *Kelly*'s trigger event and find its reliance on *Hohn*, 524 U.S. 236, *Ex Parte Quirin*, 317 U.S. 1, and *McFarland v. Scott*, 512 U.S. 849 (1994), to be misplaced. *See Gosier v. Welborn*, 175 F.3d 504, 506 (7th Cir. 1999); *Williams v. Cain*, 125 F.3d 269, 274 (5th Cir. 1997); *Williams v. Coyle*, 167 F.3d 1036, 1040 (6th Cir. 1999); and *Moore v. Gibson*, 195 F.3d 1152 (10th Cir. 1999).

In *Garceau*, the case now before this Court, the Ninth Circuit's mistaken and unique interpretation of "cases pending" under the AEDPA was the difference in upholding or vacating a state court capital murder conviction. Other allegedly pre-AEDPA capital cases remain for the Ninth Circuit to consider. The Court should take this important, pivotal opportunity to correct the Ninth Circuit's erroneous legal analysis and resolve the existing split in circuit authority.

---

4. For instance, the appointment of counsel and request for stay of execution was uncontested in this case.

II.

THE NINTH CIRCUIT ABUSED ITS DISCRETION IN GRANTING HABEAS RELIEF WITHOUT ADDRESSING *TEAGUE v. LANE*. THIS COURT SHOULD RESOLVE A SPLIT IN THE CIRCUITS, ADDRESS THE APPLICATION OF *TEAGUE*, AND VACATE THE DECISION

Despite clear notice as to the application of *Teague v. Lane*, 489 U.S. 288, the Ninth Circuit ignored *Teague*, applied a new rule of constitutional law, and reversed a state capital conviction. In failing to apply *Teague*, the Court abused its discretion and demonstrated a split in the circuits as to the federal courts' handling of this issue.

In the state trial, the prosecution introduced prior crimes evidence with an instruction that the evidence could "be considered by [the jury] for any purpose, including but not limited to any of the following: [¶] *[Defendant's] character or any trait of his character*...." (Italics added.) *People v. Garceau*, 6 Cal.4th at 185. The California Supreme Court found that the instruction given "impermissibly invited the jury to consider certain evidence . . . for the purpose of establishing defendant's propensity to commit murder," but found the error harmless beyond a reasonable doubt, applying without deciding that the standard of *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824 (1967) was applicable.[5] Thus, the California Supreme Court did not believe that any constitutional rule "dictated" consideration of this claim under the Federal Constitution. The state court found the evidence of guilt

---

5. The State explicitly contended that the instructional error was solely a matter of state evidentiary law subject only to state harmless error analysis.

overwhelming and noted that the defense desired the admission of the evidence, although not the wording of the instruction. *People v. Garceau*, 6 Cal.4th at 187. The Ninth Circuit reversed after finding a federal due process violation. *Garceau v. Woodford*, 275 F.3d 769. (Appendix A.)

In finding a due process violation, the majority opinion acknowledged it was applying a rule left unaddressed by this Court:

> [T]he Supreme Court has never expressly held that it violates due process to admit other crimes evidence for the purpose of showing conduct in conformity therewith, or that it violates due process to admit other crimes evidence for other purposes without an instruction limiting the jury's consideration of the evidence to such purposes. Indeed, the Supreme Court has expressly declined to answer these questions, *see Estelle* [*v. Maguire*], 502 U.S. [62,] at 75 n. 5, 112 S.Ct. 475 ("Because we need not reach the issue, we express no opinion on whether a state law would violate the Due Process Clause if it permitted the use of 'prior crimes' evidence to show propensity to commit a charged crime.")

Garceau, at 774-75.

Circuit Judge O'Scannlain, in his dissent, states, "[t]he majority forthrightly admits" that the Supreme Court has never expressly held that this error constitutes a due process violation. *Garceau*, at 781.

> [I]t is not clear that the majority could have reached this conclusion had it been forced to grapple with *Teague v. Lane*, 489 U.S. 288 . . . . Certainly, given that neither the Supreme Court nor this court has yet addressed the question that today's opinion answers, the state has at the very least a colorable argument that the majority today announces a "new rule" on which it cannot grant Garceau relief.

Garceau at 780, fn. 1 (citations omitted).

Teague v. Lane, 489 U.S. 288, which fully applies to capital cases, provides that federal habeas relief is unavailable if the claim rests on a "new rule" which was announced or would be created after petitioner's state appeal. A "new rule" "breaks new ground or imposes a new obligation on the State or the Federal Government" or "if the result was not dictated by precedent existing when the judgment became final." *Teague*, at 301; *Stringer v. Black*, 503 U.S. 222 (1992). *Teague* prevents the application of new constitutional rules not in existence at the time of finality because it

> seriously undermines the principle of finality which is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect.

Teague, 489 U.S. at 309.

In *Garceau*, the finding of a federal due process violation was based on the Ninth Circuit's pronouncement and application of a new rule of constitutional law. The state's reasonable good faith interpretation of the law, based on existing precedent, was undermined. *See Butler v. McKellar*, 494 U.S. 407, 414 (1990) ("The 'new rule' principle ... validates reasonable, good-faith interpretations of existing precedents made by state courts.")

A. The Ninth Circuit Abused Its Discretion In Failing To Address *Teague*

The State did not raise *Teague* until the petition for rehearing filed in the Ninth Circuit and now in the petition for certiorari.[6] When asked about *Teague* during the Ninth Circuit

---

6. If the State had raised *Teague*, the Court would have been required to address it as a threshold issue. *Graham v. Collins*, 506 U.S. 461, 466-467 (1993) (*Teague* analysis is

oral argument, the State acknowledged that it had not previously been raised. *Garceau* at 275 F.3d at 781, fn. 1.[7] Although the State did not itself raise *Teague*, there is no question that the Ninth Circuit was expressly on notice as to *Teague*'s application, given the comments by the majority and in Judge O'Scannlain's dissent, discussed *ante*.

Teague is not jurisdictional in the sense that a court has a *sua sponte* obligation to apply it. *Collins v. Youngblood*, 497 U.S. 37, 41 (1990). Instead, where *Teague* has not been raised by the prosecution, the Court has discretion in deciding whether to address it. *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994). However, this Court should find that, under circumstances such as exist in *Garceau*, where the Court is expressly on notice of the application of *Teague*, albeit from a source other than the prosecution, and where the Court's creation and application of a new rule of law will result in the reversal of a state criminal conviction, it is an abuse of discretion for a federal court to fail to address *Teague*. The Ninth Circuit's decision to ignore *Teague* under these circumstances decided an important question of federal law in a way that should be settled by this Court. Sup. Ct. Rule 10 (c).

---

ordinarily our first step when we review a federal habeas case); *Penry v. Lynaugh*, 492 U.S. 302, 313 (1989).

7. The State disputes the claim that the State's counsel, at oral argument, "declined to raise" *Teague* (*Garceau*, 275 F.3d at 781, fn. 1, dissent of Judge O'Scannlain), or "explicitly declined to invoke *Teague*" (*Garceau v. Woodford*, 281 F.3d 919), denial of petition for rehearing and rehearing en banc) to the extent this infers that an express waiver of *Teague* occurred. The State's counsel at oral argument simply stated, "*Teague* has never been raised in this case," and "I don't know why *Teague* has never been raised in this case." (*Garceau*, 275 F.3d at 781, fn. 1.) There was no express *Teague* waiver. Indeed, that question was never asked or addressed at oral argument.

The Ninth Circuit's failure to address *Teague* also is in conflict with the Fifth Circuit's approach in *Jackson v. Johnson*, 217 F.3d 360, 361-63 (5th Cir. 2000). In *Jackson*, the Fifth Circuit stated that,

> absent a compelling, competing interest of justice in a particular case, a federal court should apply *Teague* even though the state has failed to argue it. Fundamental principles of fairness are not the states' to waive.

Id.

The position taken by the Fifth Circuit in *Jackson*, 217 F.3d 360, is based on the principles underlying *Teague*, which include concerns about finality and comity in state court convictions. *Jackson* concluded that rules created to foster comity are traditionally made waivable by the states on a case-by-case basis. On the other hand,

> [c]oncerns about the finality of judgments and the evenhanded application of justice, however, are invoked for the purpose of protecting the philosophical and moral foundations of our entire judicial system. Every state ought to be concerned with preserving those foundations, but the interests in question are not unique to any particular state and therefore are not properly entrusted to the keeping of the states on a case-by-case basis.

Jackson, 217 F.3d at 362.

Jackson also properly noted that *Teague* recognized that treating similarly situated defendants differently

> exacts an unavoidable moral cost on our judicial system. *Teague*'s goal of achieving the uniform dispensation of justice cannot be achieved, however, unless the courts take it on themselves to apply a single retroactivity standard uniformly. Thus, the *Teague* nonretroactivity rule is not an affirmative defense in the traditional sense of that term; rather, it is a vehicle for the vindication of a fundamental principle of justice.

Jackson, 217 F.3d at 362-63.

The *Jackson* approach to *Teague*, particularly where a federal court is on notice as to its application, and a state capital conviction is at stake, should be adopted by this Court. Given the important principles underlying *Teague*, federal courts should not be free to apply or ignore its restrictions at will.

B. The Ninth Circuit's Reversal Of *Garceau's* Capital Conviction Is Improperly Based On A New Rule Of Constitutional Law And The Decision Should Be Vacated By This Court

The prosecution has raised the application of *Teague v. Lane*, 489 U.S. 288, in this petition for certiorari. Despite the late assertion of this issue, the *Teague* issue is now properly before this Court. *See Schiro v. Farley*, 510 U.S. 222, 228 (1994) (*Teague* not addressed because not raised in lower federal court *or* in petition for certiorari. Court recognized that "the State, as respondent, is entitled to rely on any legal argument in support of the judgment below. [Cite omitted.]"); *Godinez v. Moran*, 509 U.S. 389, 397 (1993) (*Teague* not considered because not raised in lower courts *or* in his petition for certiorari.)

The proper application of *Teague* would have prohibited the Ninth Circuit's reversal of Garceau's capital conviction. As the Ninth Circuit acknowledged, existing United States Supreme Court precedent at the time Garceau's conviction was final, had not declared a due process violation under these circumstances. See discussion, *ante*. In this case, there was no possibility that reasonable jurists would have found the analysis applied, and outcome reached, by the Ninth Circuit to be dictated by precedent. *See Lambrix v. Singletary*, 520 U.S. 518, 538 (1997). Therefore, the Ninth Circuit's

decision was improperly based on a new rule of law.

The California Supreme Court's analysis was consistent with this existing precedent and deserved to be upheld by the federal court. The California Supreme Court found that the instruction given "impermissibly invited the jury to consider certain evidence . . . for the purpose of establishing defendant's propensity to commit murder," but found the error harmless. *People v. Garceau*, 6 Cal.4th at 187. Although the California Supreme Court did not determine whether it was applicable, the Court did find that any error would be harmless beyond a reasonable doubt under *Chapman v. California*, 386 U.S. at 24 (1967). This Court should grant this petition for certiorari and apply the principles of *Teague* to uphold the Court's good faith application of the existing law.[8/]

---

8. If this Court agrees with the State's *Kelly*, 163 F.3d 530, argument (Argument 1), then the deferential review standard of 28 U.S.C. § 2254(d) applies to this case. For all of the reasons set forth in our *Teague* analysis (Argument 2B), the California Supreme Court's adjudication of the claim involved a reasonable application of established United States Supreme Court precedent. 28 U.S.C. § 2254(d)(1).

CONCLUSION

For the foregoing reasons, Petitioner prays the petition for writ of certiorari be granted.

Dated: June 5, 2002

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

ROBERT R. ANDERSON
Chief Assistant Attorney General

JO GRAVES
Senior Assistant Attorney General

CLAYTON S. TANKA
Deputy Attorney General

Janis Shank McLean

JANIS SHANK McLEAN
Supervising Deputy Attorney General
Counsel of Record

Counsel for Petitioner

JSM:el
SA2002XU0005